91-593

Supreme Court, U.S.
FILED
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NO. _____

UNITED STATES SUPREME COURT

OCTOBER, 1991, TERM

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J. MINOS SIMON,
Petitioner

VERSUS

FASIG-TIPTON, ET AL,
Respondents

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# PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA THIRD CIRCUIT

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In Proper Person
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## QUESTION PRESENTED

Has petitioner suffered a denial of procedural due process of law:

**WHERE**, in reliance upon an order of a court of competent jurisdiction limiting a record on appeal to specifically-enumerated documents and upon respondent-appellant's failure to designate for the appellate record any documents at variance with the court's order, petitioner, appellee below, refrains from performing the redundant act of moving to limit the record on appeal to those same documents;

**AND WHERE**, thereafter, the clerk of said court **FAILS** to obey the aforesaid order of the court, and further **FAILS** to give notice to petitioner that said order will not be followed, but instead proceeds to prepare the entire record of

the trial court, constituting some twelve (12) volumes, thereby drastically increasing the costs of appeal;

**AND WHERE** petitioner is not made aware of the clerk's violation of the order and the resulting excessive costs until he is taxed with those costs some twelve (12) months after they are incurred?

## PARTIES TO THE PROCEEDING

J. Minos Simon, Petitioner

L.P. "Bud" Thibodaux, Respondent

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Upon petitioner's motion for a new trial on respondent-Thibodaux's motion to fix costs of appeal, (or alternatively, to grant a rehearing on respondent's motion, or alternatively, to recall the judgment of Hon. Durwood Conque of the 15th Judicial District Court dated March 13, 1989), wherein petitioner alleged that the judgment was contrary to the law and the evidence inasmuch as the costs fixed therein were incurred in violation of the court's order of September 25, 1986, the 15th Judicial District Court, Hon. Durwood Conque, ruled that his predecessor on the court, Hon. Sue Fontenot, was without jurisdiction to limit the documentation that would be sent up on appeal. Judge Conque's ruling was made in open court in Lafayette, Louisiana, on April 17, 1989 (Appendix at

A-1), and the judgment signed on April 24, 1989 (Appendix at A-6).

Petitioner's application for certiorari, or writ of review, filed on May 1, 1989, with the Court of Appeal, Third Circuit, for the State of Louisiana, as well as petitioner's motion for a ruling of contempt, was denied on June 2, 1989 (Appendix at A-8).

On direct appeal, the Court of Appeal, Third Circuit, for the State of Louisiana, held that Louisiana law does not contemplate nor authorize the trial judge to control the content and preparation of the record on appeal, and, thus, that petitioner's argument that the clerk of the 15th Judicial District Court contemptuously violated the order of the trial court dated September 25, 1986, was without merit. J. Minos Simon v. Fasig-Tipton Company of New York, et al, unpublished opinion, No. 89-832 (La. App.

3d Cir., Feb. 6, 1991) (Appendix at A-14).

Petitioner's application for certiorari filed with the Louisiana Supreme Court was denied by a divided court on May 17, 1991 (Appendix at A-10).

## STATEMENT OF JURISDICTIONAL GROUNDS

Review is sought of the denial of petitioner's motion for a new trial on respondent-Thibodaux's motion to fix costs of appeal, or alternatively, to grant a rehearing on respondent's motion, or alternatively, to recall the judgment of Hon. Durwood Conque of the 15th Judicial District Court dated March 13, 1989 (Appendix at A-12). Petitioner's motion was denied by Judge Conque in open court in Lafayette, Louisiana, on April 17, 1989 (Appendix at A-I), and judgment was signed on April 24, 1989 (Appendix at A-6). An appeal of the trial court's judgment was taken in the Court of Appeal, Third Circuit, for the State of Louisiana. The Court of Appeal affirmed the trial court's judgment fixing the costs of appeal. J. Minos Simon v. Fasig-Tipton Company of New York, et al, unpublished opinion, No.

89-832 (La. App. 3d Cir., Feb. 6, 1991) (Appendix at A-14). Rehearing was refused on March 8, 1991 (Appendix at A-27), and certiorari or review was denied by the Louisiana Supreme Court on May 17, 1991 (Appendix at A-10).

This petition for certiorari invokes the jurisdiction of the Court pursuant to 28 U.S.C. §1651, 28 U.S.C. §1257(a) and the rules of this Honorable Court, as the only available means of vacating the April 24, 1989, judgment of the 15th Judicial District Court.

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U.S. Constitution, Amendment 5

> No person shall be ... deprived of life, liberty, or property, without due process of law; ....

U.S. Constitution, Amendment 14, Sec. 1

> .... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Louisiana Constitution of 1974, Art. 1, §2

> No person shall be deprived of life, liberty, or property, except by due process of law.

Louisiana Constitution of 1974, Art. 1, §22

> All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.

Louisiana Constitution of 1974,
Art. 1, §24

> The enumeration in this constitution of certain rights shall not deny or disparage other rights retained by the individual citizens of the state.

Louisiana Constitution of 1974,
Art. 5, §2

> A judge may issue writs of habeas corpus and all other needful writs, orders, and process in aid of the jurisdiction of his court....

Louisiana Constitution of 1974,
Art. 5, §16

> (A) Original Jurisdiction. (1) Except as otherwise authorized by this constitution or except as heretofore or hereafter provided by law for administrative agency determinations in worker's compensation matters, a district court shall have original jurisdiction of all civil and criminal matters.

* * *

La. R.S. 13:4534

> No clerk of a court may charge for the issuance of any citation, writ, mandate, summons, subpoena, order, or other process of the court which is invalid as the result of an error or omission of the clerk, a deputy clerk or other employee of the clerk in the drafting or issuance thereof.

.... No party to the action or proceeding may be charged with any of the costs of issuance, service, or execution thereof.

La. Code Civ. Proc. art. 191

A court possesses inherently all of the power necessary for the exercise of its jurisdiction even though not granted expressly by law.

La. Code Civ. Proc. art. 224

A constructive contempt of court is any contempt other than a direct one.

Any of the following acts constitutes a constructive contempt of court:

(1) Willful neglect or violation of duty by a clerk, sheriff, or other person elected, appointed, or employed to assist the court in the administration of justice;

(2) Willful disobedience of any lawful judgment, order, mandate, writ, or process of the court;

* * *

(10) Any other act or omission punishable by law as a contempt of court, or intended to obstruct or interfere with the orderly administration of justice, or to impair the dignity of the court or respect for its authority, and which is not a direct contempt.

La. Code Civ. Proc. art. 257

> The neglect, failure, or refusal of a clerk, deputy clerk, or other employee of a clerk of court to perform any ministerial duty subjects him to punishment for contempt of court.

La. Code Civ. Proc. art. 2088

> The jurisdiction of the trial court over all matters in the case reviewable under the appeal is divested, and that of the appellate court attaches, on the granting of the order of appeal and the timely filing of the appeal bond, in the case of a suspensive appeal or on the granting of the order of appeal, in the case of a devolutive appeal. . . .

* * *

La. Code Civ. Proc. art. 2121

> An appeal is taken by obtaining an order therefor, within the delay allowed, from the court which rendered the judgment.

La. Code Civ. Proc. art. 2128

> The form and content of the record on appeal shall be in accordance with the rules of the appellate court, except as provided in the constitution. However, within three days, exclusive of holidays, after taking the appeal the appellant may designate in a writing filed with the trial court such portions of the

> record which he desires to constitute the record on appeal. Within five days, exclusive of holidays, after service of a copy of this designation on the other party, that party may also designate in a writing filed with the trial court such other portions of the record as he considers necessary. In such cases the clerk shall prepare the record on appeal as so directed, but a party or the trial court may cause to be filed thereafter any omitted portion of the record as a supplemental record. When no designation is made, the record shall be a transcript of all the proceedings as well as all documents filed in the trial court.

Uniform Rules of Louisiana Courts of Appeal, Rule 2-1.

> The record for a Court of Appeal shall be prepared by the clerk of the trial court from which the appeal is taken, or to which the writ is directed, in accordance with the requirements set forth in this Rule.

Uniform Rules of Louisiana Courts of Appeal, Rule 2-1.16.

> It is the responsibility of the clerk of the trial court from which a case is appealed, or to which writs are directed, to prepare the record for a Court of Appeal....

Uniform Rules of Louisiana Courts of Appeal, Rule 2-1.17.

> Notwithstanding the foregoing requirements, the parties may designate in writing, portions of the record to constitute the record in a Court of Appeal.

## STATEMENT OF THE CASE

On November 1, 1985 and January 15, 1986, petitioner filed two (2) supplemental petitions asserting claims against his former agent, respondent L.P. "Bud" Thibodaux, for misappropriation of funds and an accounting secondary to Thibodaux's violation of his fiduciary duty to petitioner. In particular, petitioner alleged that Thibodaux had developed a kickback scheme in connection with the purchase, on behalf of petitioner, of thoroughbred horses. On February 28, 1986, Thibodaux filed a reconventional demand claiming a partnership relationship between himself and petitioner and made claim to certain things of value against petitioner.

On July 30, 1986, petitioner filed a motion for summary judgment as to Thibodaux's reconventional demand. In support of his motion for summary

judgment petitioner offered, in addition to the pleadings, the following evidence:

a. The deposition of L.P. THIBODAUX on file in this cause;

b. The deposition of Waldemar, Inc. filed in this cause to the extent that it includes the syndicate contract on the stallion, "Honest Moment," as Exhibit Number 1, and as to the nonrecognition of J. Minos Simon as record owner of any interest in "Honest Moment," particularly page 7, questions and answers 7 and 8; pages 11 and 12, questions and answers 18 and 19, and a Louisiana Bloodstock check dated February 2, 1983, in the amount of SIX THOUSAND, FIVE HUNDRED AND NO/100 ($6,500.00) DOLLARS, existing as Exhibit Number 6, including page 15, and questions and answers 34 and 35;

c. Interrogatory No. 8 and defendant's answer thereto of plaintiff's first set of interrogatories;

d. Plaintiff's Affidavit and pertinent documents attached thereto; and,

e. The transcript of the testimony of Thibodaux given on June 27, 1986, in connection with the captioned matter.

On August 7, 1986, defendant Thibodaux filed a motion for summary judgment as to certain aspects of petitioner's claim against him. In support of his motion Thibodaux offered, in addition to the pleadings, the following evidence:

1. The affidavit of defendant Thibodaux;

2. The affidavit of T. Mason Grasty; and,

3. The affidavit of Rodney Verret.

On August 13, 1986, Thibodaux filed a brief in opposition to petitioner's motion and attached thereto his affidavit in opposition to petitioner's motion.

On August 14, 1986, petitioner filed two (2) affidavits in opposition to Thibodaux's motion for summary judgment.

On August 18, 1986, the trial court heard the respective motions for summary judgment and took the motions under

advisement. On August 29, 1986, the trial court granted Thibodaux's motion for summary judgment from which petitioner did not appeal. The trial court also granted judgment in favor of petitioner on his motion for summary judgment. On September 9, 1986, the trial court signed a judgment in accordance with its ruling of August 29, 1986. Thereafter, on written motion, respondent Thibodaux applied for an appeal from the summary judgment rendered against him. On September 25, 1986, the trial court granted Thibodaux's motion for appeal and in doing so rendered the order appearing in the Appendix at page A-28.

On February 3, 1988, the Court of Appeal, Third Circuit, reversed the trial court's judgment granting petitioner's motion for summary judgment against Thibodaux. J. Minos Simon d/b/a

Dixieland Farm v. Fasig-Tipton Company of New York, et al, 524 So.2d 788, writs denied 525 So.2d 1048 and 1049. In reversing the trial court's decision, appellate court directed that "all costs of this appeal are taxed to the plaintiff-appellee," namely, petitioner herein.

On January 19, 1989, Thibodaux filed a motion before the trial court to fix costs of appeal, relying on the February 3, 1988, decision of the appellate court, and alleging that the appeal costs ruling of the appellate court was final and executory. On January 27, 1989, petitioner responded by filing a declinatory exception of prematurity, essentially based on the contention that no final judgment had been rendered.

On January 30, 1989, the trial court heard the motion to fix costs and petitioner learned during that hearing

**for the first time** that the Clerk of Court had violated the appeal order of the trial court issued some two years and four months previously, by including in the transcript of appeal the entire record of the case, consisting of some twelve (12) volumes.

On March 1, 1989, the trial court overruled petitioner's exception of prematurity and granted Thibodaux's motion to fix costs, which is exemplified by the minute entry reproduced in the Appendix at page A-30. The judgment appearing in the Appendix at page A-12 was executed by the trial court on March 13, 1989. On March 2, 1989, one (1) day after the filing of the minute entry and prior to the signing of the judgment, Thibodaux filed and the trial court granted a motion to examine petitioner as a judgment debtor and requested an order compelling petitioner to produce all of

his books, papers, etc. concerning his estate and property. Appendix at page A-32 & A-36.

On March 16, 1989, petitioner filed a notice of intention to apply to the Court of Appeal, Third Circuit for supervisory writs as to the ruling of the trial court and for a stay order. On March 17, 1989, the trial court signed petitioner's proposed order making his application returnable on April 19, 1989, and staying the trial court's ex parte order of March 2, 1989 (Appendix at A-41).

On May 3, 1989, in response to petitioner's application for supervisory writs, the Court of Appeal, Third Circuit refused to consider petitioner's writ application. Appendix at page A-39.

In the meantime, on March 20, 1989, petitioner had filed a motion for new trial alleging that the trial court's

judgment of March 13, 1989, fixing the costs of appeal was contrary to the law and the evidence. More particularly, petitioner alleged that the Clerk's action in preparing the record on appeal that consisted of the entire twelve (12) volumes of the trial court record in this case was null and void because the Clerk's action existed in violation of the trial court's order of September 25, 1986, limiting the record on appeal, and that on that account all costs incurred by the Clerk in excess of those costs necessary to prepare the limited record on appeal were unenforceable against petitioner.

On April 17, 1989, the trial court denied petitioner's motion for new trial, holding that the predecessor trial court's order of September 25, 1986, limiting the record on appeal was un-enforceable and could be ignored with

impunity by the Clerk (Appendix at A-1). Judgment to that effect was entered on April 24, 1989 (Appendix at A-6).

On May 8, 1989, petitioner, on written motion, requested a suspensive appeal from the judgment of March 13, 1989, which cast petitioner with costs in the amount of FOUR THOUSAND ONE HUNDRED FORTY-FOUR AND 60/100 ($4,144.60) DOLLARS for the appeal taken by respondent on respondent's motion for summary judgment.

During the pendency of petitioner's appeal, defendant Thibodaux filed a motion to dismiss the appeal "on the ground" as stated by the appellate court, "that the judgment sought to be appealed is an interlocutory judgment that will not cause irreparable injury." That motion was denied and subsequently affirmed by the Court of Appeal on February 6, 1991. The appellate court held that its order casting petitioner

for appeal costs, granted as an incident to its earlier interlocutory decision reversing the trial court's judgment on petitioner's motion for summary judgment, was a final judgment.

On the question of the indisputable fact that the Clerk of Court violated the trial court's order limiting the record on appeal, the appellate court simply ruled that the trial court did not have the authority to grant the order limiting the record on appeal. The opinion of the appellate court is reproduced in the Appendix at page A-14.

Petitioner filed a timely application for rehearing as to the appellate court's decision. Among the issues addressed in his application, petitioner raised the federal question sought to be reviewed herein:

> TO CONDEMN APPELLANT FOR COSTS THAT WERE INCURRED DIRECTLY AS THE RESULT OF THE VIOLATION OF THE COURT ORDER

OF THE TRIAL COURT IS CONFISCATORY IN NATURE AND CONSTITUTES A TAKING OF THE APPELLANT'S PROPERTY WITHOUT DUE PROCESS AND THE EQUAL PROTECTION OF LAWS AND IS THEREFORE NULL AND VOID.

On March 8, 1991, the appellate court refused petitioner's application for rehearing. Appendix at A-27.

On April 5, 1991, petitioner applied for a writ of certiorari and/or review with the Supreme Court of the State of Louisiana. Petitioner's application was denied on May 17, 1991, by a divided court. Appendix at A-10.

The instant petition for certiorari is made as to the appellate court's decision affirming the decision of the trial court whereby petitioner is cast for FOUR THOUSAND ONE HUNDRED FORTY-FOUR AND 60/100 ($4,144.60) DOLLARS.

## ARGUMENT

**I. Under the facts of this case, the appellate court's holding that the trial court's order was not authorized by Louisiana law represents useless obeisance to procedural detail to the clear prejudice of petitioner.**

The question at issue is not whether a trial court has the authority to designate a record on appeal, and usurp the right given to an appellant, but rather, whether a trial court may be involved in arriving at an agreement as to a record which will not only adequately address all matters presented for review, but in so doing alleviate excessive and wasteful costs. To imply that La. Code of Civ. Proc. art. 2128 requires an appellee to designate the record on appeal, when the trial court has already ordered that the record on appeal consist of specifically-enumerated documents, flies in the face of the express wording of the statute, the purpose of the

statute, established Louisiana jurisprudence and the orderly administration of justice. Art. 2128 provides that"... the appellant may designate in a writing filed with the trial court such portions of the record which he desires to constitute the record on appeal..." (emphasis supplied). Thereafter, the appellee "... may also designate in a writing filed with the trial court such other portions of the record as he considers necessary..." (emphasis supplied). Thereafter, "a party or the trial court may cause to be filed ... any omitted portion of the record as a supplemental record..." (emphasis supplied).

Clearly, it is the appellant who bears the initial burden of designating a record to support his argument under art. 2128. Plunkett v. Plunkett, 576 So.2d 100, 104 (La. App. 2d Cir. 1991); Pitts v. Bailes, 551 So.2d 1363, 1372, 1377

(La. App. 3d Cir. 1989); Preuett v. Preuett, 517 So.2d 848, 849 (La. App. 3d Cir. 1987); Eagle v. Eagle, 477 So.2d 1293 (La. App. 3d Cir. 1985). Petitioner concedes that the respondent-appellant did not designate the record in accordance with art. 2128. Rather, respondent-appellant relied on the trial court's order of September 25, 1986. Had appellant lost the appeal and been placed in the position that petitioner now occupies, surely he would be making an argument identical to petitioner's: that the unexpected and unnecessarily inflated cost of appeal is not only unfair but also lacking in the procedure and process of law due him.

Equally clearly, the trial court may be involved in the designation of the record on appeal. As a general rule, the record on appeal should, if possible, include all matter necessary for a

consideration of the questions presented for review. Fontenot v. Succn. of Garland, 352 So.2d 251, 257 (La. App. 3d Cir. 1977). See also: 4 Am. Jur. 2d 862-865, Appeal & Error, §§ 397-399. To include extraneous matters would foster waste.

The orderly administration of justice requires that parties be able to rely on an order of a trial court, exactly as petitioner and respondent-Thibodaux, did, and expect such an order to be obeyed by the clerk of court until such order is challenged and overturned. A trial judge's ruling is final unless and until the supervisory jurisdiction of the court of appeal is invoked. Favrot v. Favrot, 200 So.2d 295 (La. App. 1st Cir. 1967).

Respondent-appellant, Thibodaux, did nothing inconsistent with the court's September 25, 1986, order, although it

was upon him that La. C.C.P. art. 2128 placed a duty in connection with designating the record for appeal. The law does not require one to perform a vain and useless act. Respondent-appellant Thibodaux had no reason to designate any documents to be included in the appellate record other than those already designated in the trial court's order. What would have been a vain and useless act for respondent-appellant would have been a vain and useless act for petitioner-appellee as well. Art. 2128 gave petitioner-appellee the right to supplement, but not to subtract from any designation previously made by appellant. In the case of an appellee desiring to supplement the record as designated by the appellant, (the scenario envisioned by the statute), the differences would be worked out between the parties with the assistance of the trial court. When

disputes occur over the proper record on appeal, resolution is to be sought between the parties and the trial judge for the purpose of reducing the costs of appeal. Favrot v. Favrot, supra. One need not travel much further down this path to conclude that the trial court may order that the record on appeal be comprised of certain documents, especially when the parties are in agreement and such order will eliminate waste and excess.

Simply put, this entire controversy resulted from the clerk of court's failure to obey an order of the trial court. The clerk is now trying to pass the buck to petitioner for failure to adhere strictly to the letter of the statute, although the purpose of the statute had been abundantly fulfilled by the court's order. Even under the strict letter of the statute, petitioner-

appellee's duty to supplement respondent-appellant's designation of the record never even arose in this case because respondent-appellant, in reliance on the court's order, never designated a record on appeal.

One would hope that the courts of Louisiana would not condone the tyranny of technicality only to condemn litigants to unfairness and surprise. Nevertheless, that is the sort of severe procedure to which the courts are attempting to subject petitioner in the instant case.

**II. Petitioner faces the confiscation of his property as a result of the clerk of court's refusal to obey the trial court's order, an effect clearly in violation of petitioner's constitutional right to due process.**

Holding petitioner responsible for the cost of preparing a record for appeal purposes that was largely unnecessary to the issue on appeal, and where petitioner

was not given notice that the entire record was prepared in violation of the trial court's specific order to the contrary, is confiscatory in nature and constitutes a taking of petitioner's property without due process of law. The constitutional right to due process is embodied in the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 2 of the Louisiana Constitution of 1974.

A. Nature of Due Process.

As often recognized by this Honorable Court, due process is a flexible concept that varies with the particular situation. Zinermon v. Burch, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). The essence of due process is fundamental fairness. Zinermon, 494 U.S. at _____, 110 S.Ct. at 995; U.S. ex rel Crist v. Lane, 745 F.2d 476 (7th Cir. 1984). To allow a court clerk to disobey

with impunity an order of the court, which he serves, to the detriment and severe prejudice of a litigant, who was not required by law to perform any act to avoid such consequences, is not only fundamentally unfair, but also shocking to the sense of justice of any reasonable citizen. The due process clause of the Fifth Amendment protects against denials of fundamental fairness that are shocking to the universal sense of justice. U.S. v. Rivera, 900 F.2d 1462 (10th Cir. 1990).

The cornerstone of due process is prevention of abusive governmental power. Daniels v. Williams, 474 U.S. 327, 330-31, 106 S.Ct. 662, 664-65, 88 L.Ed.2d 662 (1986); Weimer v. Amen, 870 F.2d 1400, 1405 (8th Cir. 1989). The clerk's action in the instant case was a blatant abuse of his ministerial function. Moreover, the appellate court's absolu-

tion of the clerk's act and the taxing of petitioner with the excessive costs of appeal represent abuse of that court's discretion and power. To propose that it was reasonable for the clerk of court to ignore the court's order designating the record on appeal, as did Judge Conque in his ruling of April 17, 1989, is an invalid argument. Under La. C.C.P. art. 2088, the trial court is not divested of jurisdiction until the appeal bond is posted by appellant. Clearly, the trial court, possessed of jurisdiction to enter the order granting appeal, possessed jurisdiction to limit the record within the body of that same order.

B. Validity of Trial Court's Order.

The Louisiana Constitution of 1974, Art. 5, §2, provides that a judge may issue all needful orders in aid of the jurisdiction of his court. Art. 5, §16, grants district courts original juris-

diction over all civil matters. La. Code Civ. Proc. art. 191 provides:

> A court possesses inherently all of the power necessary for the exercise of its jurisdiction even though not granted expressly by law.

The power and authority of a district court to grant an appeal from any district court judgment is clear and unquestionable. La. Code Civ. Proc. art. 2121, in pertinent part, expressly provides:

> An appeal is taken by obtaining an order therefor, within the delay allowed, from the court which rendered the judgment.

Exercising its power as to such an appeal, the district court, in response to respondent-Thibodaux's application for an appeal order, granted the appeal request, which it had the power to do. Then, "though not granted expressly by law," the district court, exercising its "inherent" power "necessary for the exercise of its jurisdiction," addition-

ally ordered:

> It is further ordered that only that evidence, documents, and/or affidavits offered and relied upon by the parties in connection with their respective motions for summary judgment shall be included in the transcript to be prepared by the clerk of court.

### C. Purpose of La. Code Civ. Proc. Art. 2128 Fulfilled.

The Court of Appeal, obviously aware of the flimsiness of Judge Conque's reasoning, preferred to ground its decision on the equally-shaky ground that Louisiana law does not grant the trial court authority to limit the record on appeal. While petitioner would concede that the trial court may not limit the record on appeal when the parties to the appeal desire a more complete record, the purpose of limitation of the record on appeal is to avoid the wasteful and unnecessary preparation of a voluminous record when the issues appealed require only a record restricted to those issues.

The decision of the appellate court, holding that the district court was not "authorized" to enter this limiting order, defies the provisions of the La. Constitution and the La. Code of Civil Procedure, which grant district courts plenary authority in all civil cases. Furthermore, that decision is in conflict with the decision of the Louisiana Court of Appeal, First Circuit, in Favrot v. Favrot, supra. The appeal in Favrot arose out of the defendant's citation for contempt in connection with an ongoing dispute over child visitation and support. The defendant sought to have the record on appeal limited to the transcript of testimony at the hearing on the charge of contempt, but the trial court ordered that transcripts of other days' testimony also be prepared and included in the record on appeal. The facts showed that the trial court had made it

a practice of having hearings reduced to writing in cases of this type because of their ongoing nature and to avoid repetitive testimony. The defendant objected to having to pay for, and including in the record, transcripts that did not involve the hearing on the contempt order.

The court of appeal stated the question on appeal to be "whether or not it was within the trial judge's authority to include in this record the transcript of testimony he had previously ordered transcribed." Favrot, 200 So.2d at 299. It then cited La. Code Civ. Proc. art. 2128, which, in addition to allowing the parties to designate portions of the record to be included upon appeal, allows the trial court to "cause to be filed thereafter any omitted portion of the record as a supplemental record." The court then stated:

> Under the clear authority of this article appellant is given authority to designate such portions of the record as he desires to constitute the record on appeal. Appellee is given five days thereafter to designate what portions of the record she desires to constitute the record on appeal. The trial judge also has the authority to designate what he considers to be any omitted portions of the record. In the event there develops a serious dispute as to the composition of the record for appeal reason dictates that the parties should endeavor to reconcile their differences invoking if desired the assistance of the trial judge. Undoubtedly extraneous matters can be eliminated and the cost of appeal reduced proportionately. The ruling of the trial judge is final unless and until the supervisory jurisdiction of the appropriate appellate court is invoked. Appellant's assertion under the facts of this case as borne out by the record that is before us that the trial judge is without authority to designate what should or should not be in the record is in error and contrary to the express provisions of LSA-CCP Art. 2128. (Emphasis supplied).

Favrot, 200 So.2d at 300-301.

Unquestionably, either an error or a blatant dereliction has occurred on the part of the clerk of court. To require petitioner to bear the brunt of that

failure when sound reason required him to act in no different a manner than he did, would work a great injustice. Even nearing the turn of another century, two wrongs do not make a right. The trial court's order of September 25, 1986, binding on petitioner and respondent-Thibodaux, was equally binding on the clerk of court. The clerk of court cannot be excused from willfully disobeying a distinct order of the court.

D. Challenging Invalid Orders.

Even if the limiting order of the trial court was invalid, which petitioner at all times denies, that order could not be violated with impunity. In City of Lake Charles v. Bell, 347 So.2d 494 (La. 1977), the court considered the validity of a contempt citation against an attorney who refused to participate in a criminal trial after he petitioned to remove the case to federal court despite

a direct court order that he assist in his client's defense. Although the attorney asserted that the trial court was without jurisdiction because of the petition for removal, the court stated:

> It is a well-accepted principle in proceedings for criminal contempt that orders of the trial judge in the conduct of trials must be obeyed, irrespective of the ultimate validity of the order, unless the trial judge stays the order or ruling to permit a review. The correctness of a court order or ruling is not contested by deciding to willfully disobey it, without suffering the consequence of that disobedience.... Absent a showing of transparent invalidity or patent frivolity surrounding the order, it must be obeyed until stayed or reversed by orderly review.

Bell, 347 So.2d at 496 (citing United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972)).

A court's power to decide includes the power to decide wrongly. Bell, 347 So.2d at 497. The court also held that the rule that invalid court orders must nevertheless be obeyed presupposes three conditions: (1) the court has subject

matter and personal jurisdiction; (2) adequate remedies are available for review; and(3) the order does not require an irretrievable surrender of constitutional rights. Bell, 347 So.2d at 497-498.

To the same effect is Kidd v. Caldwell, 371 So.2d 247 (La. 1979), where an attorney's contempt citation for refusing to appear in court and continue a trial after the court ignored his motion to have the judge recused, was upheld on appeal. Even though the appellate court found merit to the attorney's argument that the trial should not have proceeded after the recusal motion was filed, it held that his proper course was to apply for supervisory writs, not to disobey the trial court's order that he continue the trial. Citing the Bell decision, the court reiterated that an order must be obeyed. Its

correctness cannot be contested by willful disobedience.

This principle of law has been addressed repeatedly by this Honorable Court and held valid and necessary to the orderly administration of justice. In Walker v. City of Birmingham, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967), for example, this Court was called upon to determine whether or not those who violated a state court order could be held in contempt of court, where defiance of the order rested on the belief by the actors that the court order in question was unconstitutional. The actors in Walker were enjoined by ex parte order of a state court from engaging in sit-in demonstrations, kneel-in demonstrations and mass street parades, all secured by the First Amendment. Appeal to this Court was taken from a contempt conviction for violating the ex

parte order. In affirming the conviction, the Court laid down the rule of law applicable in such situations:

> As a general rule, an unconstitutional statute is an absolute nullity and may not form the basis of any legal right or legal proceedings, yet until its unconstitutionality has been judicially declared in appropriate proceedings, no person charged with its observance under an order or decree may disregard or violate the order or the decree with immunity from a charge of contempt of court; and he may not raise the question of its unconstitutionality in collateral proceedings on appeal from a judgment of conviction for contempt of the order or decree.
>
> * * *
>
> The rule of law that Alabama followed in this case reflects a belief that in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional

freedom.

Walker, 388 U.S. at 310, 87 S.Ct. at 1832.

Further, this Court observed:

> This case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims.

Walker, 388 U.S. at 318, 87 S.Ct. at 1831.

This rule of law was the focus of attention of the Fifth Circuit Court of appeals in United States v. Dickinson, supra. In that case the district court issued an ex parte order from the bench prohibiting the publication by all news media of any portion or all of the testimony developed during a hearing to occur immediately following the issuance of the order. Two newspaper reporters, believing that the gag order violated their First Amendment rights, elected to ignore the district court's order and

proceeded to report the evidence developed during the hearing in two state newspapers. The newspaper reporters were found guilty of contempt by the district court whose order they defied. On appeal, the court held that the district court's order was overly broad and therefore unconstitutional. On reaching that conclusion, however, the court stated:

> The conclusion that the District Court's order was constitutionally invalid does not necessarily end the matter of the validity of the contempt convictions. There remains the very formidable question of whether a person may with impunity knowingly violate an order which turns out to be invalid. We hold that in the circumstances of this case he may not.

Dickinson, 465 F.2d at 509.

In verbalizing the rationale justifying citing these two newspaper reporters for contempt, the court recited the applicable universal principle of law in these words:

> We begin with the well-established principle in proceedings for criminal contempt that an injunction duly issuing out of a court having subject matter and personal jurisdiction must be obeyed, irrespective of the ultimate validity of the order. Invalidity is no defense to criminal contempt. (citations omitted). People simply cannot have the luxury of knowing that they have a right to contest the correctness of the judge's order in deciding whether to willfully disobey it.... Court orders have to be obeyed until they are reversed or set aside in an orderly fashion.

Dickinson, 465 F.2d at 509.

The federal court spoke to the uniqueness of the judiciary as opposed to the executive and legislative branches of government. It observed that orders or commands of either the legislative or executive branch of government may be challenged by disobedience and thereafter the validity of such order or command tested without penalty, if such orders or commands are found to be invalid. Not so in dealing with judicial orders. As the federal court said:

> Significantly, it is only the orders of judicial authorities which must be tested in the courts before deliberate transgression can be excused on an eventual determination that the order was invalid.

Dickinson, 465 F.2d at 510.

The Court observed that this unique principle of law was not "the product of self-protection or arrogance of judges. Rather it is born of an experience-proved recognition that this rule is essential for the system to work." After distinguishing the operative effect of disobedience of legislative or executive orders or commands from those of the judiciary, the court further elaborated:

> On the other hand, the deliberate refusal to obey an order of the court without testing its validity through established processes requires further action by the judiciary, and therefore directly affects the judiciary's ability to discharge its duties and responsibilities. Therefore, "while it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the

> duties imposed on them by law. Without it they are mere boards of arbitration whose judgments and decrees would be only advisory."

Dickinson, 465 F.2d at 410.

Likewise, the Louisiana Supreme Court has held:

> If a person to whom a court directs an order believes that the order is incorrect the remedy is to apply for review, but absent a stay, to comply promptly with the order pending review. Persons who make private determinations of the law and refuse to obey an order risk criminal contempt even if the order is ultimately ruled incorrect.

State v. Meyer, 375 So.2d 372, 373 (La. 1979).

**E. Contempt of Court.**

Aside from falling squarely within the principle of law enunciated above, the clerk of court's disobedience of the trial court's order constitutes a constructive contempt of court under the express law of Louisiana. La. Code Civ. Proc. art. 224 provides, in pertinent part:

> A constructive contempt of court is any contempt other than a direct one.
>
> Any of the following acts constitutes a constructive contempt of court:
>
> (1) Willful neglect or violation of duty by a clerk, sheriff, or other person elected, appointed, or employed to assist the court in the administration of justice;
>
> (2) Willful disobedience of any lawful judgment, order, mandate, writ, or process of the court;
>
> * * *
>
> (10) Any other act or omission punishable by law as a contempt of court, or intended to obstruct or interfere with the orderly administration of justice, or to impair the dignity of the court or respect for its authority, and which is not a direct contempt.

La. Code Civ. Proc. art. 257 provides:

> The neglect, failure, or refusal of a clerk, deputy clerk, or other employee of a clerk of court to perform any ministerial duty subjects him to punishment for contempt of court.

The appellate court, after concluding, though erroneously, that the limiting order of the trial court was invalid, failed to take the additional step to

determine whether a person may with impunity knowingly violate an order which turns out to be invalid. Thus, the court in effect failed to adjudicate the legal question presented by petitioner in connection with his appeal. Assuming, for the sake of argument, that the district court was not authorized to control the content and preparation of the record on appeal, the fact of the matter is that this is precisely what the order of the district court accomplished. Moreover, this order of the district court was obtained not by petitioner, but by respondent Thibodaux. Thibodaux secured the order and filed the order in the records of the cause pending in the district court. The clerk of court, for reasons best known to himself, deliberately refused to obey the order of the district court. Instead of preparing a transcript record for appeal that

consisted of "only that evidence, documents, and/or affidavits offered and relied upon by the parties in connection with their respective motion for summary judgment," the clerk of court, on his own, prepared a transcript of the entire record of this case, consisting of some twelve (12) volumes, thus dramatically increasing the cost of appeal. The petitioner cannot be held to pay the cost of a record vastly inflated beyond what was reasonably necessary and ordered by the trial court. Rather, the excess costs must be absorbed by the clerk of court on the general principle of law that a clerk cannot charge for his errors. See La. R.S. 13:4534.

F. **Assessment Contravened Petitioner's Right to Due Process.**

The excessive costs resulted directly from the violation of the order of the trial court by the clerk of court, as

shown above. Yet, notwithstanding that petitioner was duty-bound to obey the order of the district court until it was recalled or reversed, and notwithstanding that he was not involved in the violation of this order that generated the excessive costs, and without finding petitioner at fault, delictually or contractually, the appellate court assessed to petitioner the costs directly resulting from the conduct of the clerk of court's violation of the court's order. Such a ruling and assessment of costs exist in violation of petitioner's right to constitutional due process.

Of primary importance in the instant case is the procedural aspect of the due process guarantee. "The central meaning of procedural due process is well-settled: Persons whose rights may be affected are entitled to be heard; and in order that they may enjoy that right,

they must first be notified." Wilson v. City of New Orleans, 479 So.2d 891, 894 (La. 1985). Any significant taking of property by the state is within the purview of the due process clause. Wilson, 479 So.2d at 894. The difference between the cost of appeal as taxed to petitioner, over four thousand dollars, and the cost of a record as ordered by the trial court, only a few hundred dollars, is significant. Petitioner faces obvious prejudice from the imminent deprivation of a substantial property interest as a result of the clerk of court's error. In Seguar v. Louisiana Architects Selection Board, 362 So.2d 498, 499 (La. 1978), the court made clear that the liability of a party for costs reduces the value of any award to that party and thereby adversely affects the party's litigation rights. In Roadway Express, Inc. v. Piper, 447 U.S. 752, 767

n. 14 (1980), this Court held that the assessment of costs and fees of litigation upon a party can only be done in conformity with the due process requirements of notice and hearing. Thus, it is clear that in this case petitioner has a property interest that is protected by the due process clauses of the U.S. and Louisiana Constitutions.

Procedural due process claims involve those expectations created by state law, and as to such rights, states may take them away by affording predeprivation hearings, postdeprivation hearings, or by providing other safeguards. Taylor v. Ledbetter, 818 F.2d 791, 794 (11th Cir. 1987). Postdeprivation remedies do not provide due process if predeprivation remedies are practicable. Logan v. Zimmerman Brush Co., 455 U.S. 422, 436, 102 S.Ct. 1148, 1158, 71 L.Ed.2d 265 (1982); Fetner

v. City of Roanoke, 813 F.2d 1183, 1186 (11th Cir. 1987). Petitioner was entitled to notice and an opportunity to be heard on matters that would affect his liability for costs. Although Louisiana law granted petitioner an opportunity to be heard on the matter of what should be included in the record by virtue of La. Code Civ. Proc. art. 2128, the major failing here was that he was given no notice of the fact that the record would include voluminous portions of the transcript that were not designated as part of the record by the trial court's order. The predeprivation hearing necessary in this case was notice that the clerk of court intended to disobey the trial court's order and instead prepare the entire record on appeal. That notice was not given to either party in jeopardy of being taxed with appeal costs. No other predeprivation remedy is

practicable in this case because the Louisiana courts have abused their power in denying relief to petitioner. The ruling of the court of appeal that petitioner had an opportunity to designate the record under art. 2128, while taking account for petitioner's right to be heard, does not take account for the fact that petitioner was also entitled to notice of the fact that the record would be completed in violation of the district court's order. Neither does it take account for the fact that this lack of notice deprived petitioner of his ability to be heard on the matter through the procedures set out in art. 2128. Therefore, any attempt to tax the costs of the appeal over and above what was necessary to prepare the record as designated by the trial court's order would violate petitioner's due process right to notice. A basic requirement of

due process is notice reasonably calculated under all the circumstances to apprise interested parties of an action impacting on their rights and affording them an opportunity to present objections. Schroeder v. City of New York, 371 U.S. 208, 211, 83 S.Ct. 279, 282, 9 L.Ed.2d 255 (1962); Klein v. Klein, 487 So.2d 775, 776 (La. App. 3d Cir. 1986). Failure to afford a party such notice renders actions by the state affecting a property interest void. Thus, in Smith v. Department of Health & Human Services, 432 So.2d 997, 999 (La. App. 1st Cir. 1983), an administrative board's dismissal of a civil servant's appeal was found unconstitutional by the court where the board's notice of the date of the appeal was not received by the civil servant through no fault of her own. Similarly, in Klein, 487 So.2d at 776, a court's default order changing

custody of a child from the mother to the father was held to have been entered in violation of the mother's due process rights where the notice of the hearing on custody sent to the mother did not state a time or date for the hearing. Likewise in the instant case, petitioner was not afforded notice of the clerk's unilateral decision to prepare the record on appeal in violation of the trial court's order, and was thereby deprived of his opportunity to challenge that action by orderly means.

The Court of Appeal's reasoning that petitioner could have acted under art. 2128 to assure that the record was limited and his exposure to costs minimized ignores the facts that petitioner was operating under the reasonable assumption that the trial court's order would be followed and that petitioner was never given notice that

the clerk was acting in contravention of that order. Thus, the fact that petitioner may have had a means at his disposal to restrict the scope of the record is of little significance since he had no reason to believe that resort to art. 2128 would be necessary. "[T]he requirement that parties be notified of proceedings affecting their legally protected interests is obviously a vital corollary to one of the most fundamental requisites of due process--the right to be heard. 'This right ... has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.'" Schroeder, 371 U.S. at 212, 83 S.Ct. at 282 (quoting Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657 (1950)). The fact that petitioner had the ability to designate the record was of little

worth to him if he was not informed that the record was to be compiled at odds with the court's order.

Applying the test of procedural adequacy under the due process clause formulated by the Court in Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976), the cost of the clerk of court notifying the parties and the court that the court's order would not be followed, or alternatively, challenging the validity of the court's order, would have been minimal compared to the benefits that would have accrued to the party taxed with costs of the appeal. That party, petitioner herein, could have easily avoided the unnecessarily exorbitant costs. As it happened in the instant case, petitioner was not even aware of the clerk's error/dereliction until more than two years after the record was

prepared. To require petitioner to forego his entitlement to a record streamlined to the issues on appeal as ordered by the trial court and instead pay substantial costs to his clear prejudice is an egregious departure from accepted standards of legal justice.

Thus, the undersigned respectfully submits that special and important reasons exist for the granting of this petition for writ of certiorari.

Respectfully submitted:

**J. MINOS SIMON**
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Lafayette, Louisiana 70505
Telephone: (318) 233-4625
Bar Roll No: 12278

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# A P P E N D I X

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|---|---|
| J. MINOS SIMON d/b/a DIXIELAND FARM | SUIT NO. 85-6761 "G" |
| VS. | 15TH JUDICIAL DISTRICT |
| FASIG-TIPTON LOUISIANA, INC., ET AL | PARISH OF LAFAYETTE |
| | STATE OF LOUISIANA |

* * * * * * * * * * * * * * * * * * * * * *

PRESENT: HONORABLE DURWOOD CONQUE,
PRESIDING JUDGE

RAYMOND ALLEN, ESQ.
ANTHONY FAZZIO, ESQ.
ATTORNEYS AT LAW
LAFAYETTE, LOUISIANA
REPRESENTING: PLAINTIFF

HENRY C. PERRET, ESQ.
ATTORNEY AT LAW
LAFAYETTE, LOUISIANA
REPRESENTING: DEFENDANT

OPEN COURT
LAFAYETTE, LOUISIANA
APRIL 17, 1989

FILED:
APRIL 20, 1989

**RULING OF THE COURT**

THE COURT. It will be the ruling of the Court as follows: The Motion for New Trial will be denied, on the basis that the motion upon which the ruling was granted was the motion to fix costs of

appeal, which costs were fixed based on the testimony of the Clerk of Court representative. There's been nothing presented in argument or in pleading before this Court to indicate that evidence would be any different, that there's any new found evidence that would change the Clerk's testimony, nor has there been any argument or suggestion that there was an error of law of fact by this Court in making the ruling, nor was any fraud committed by any party.

The real problem is the argument that the costs were set as the result of documents or parts of record being sent up to the Court of Appeal in violation of an order by this Court's predecessor, which purported to limit the documentation that would be sent up on appeal. No. 1, the Court questions the validity of such a judgment because, as pointed out in those cases cited by Mr. Allen

this morning, an order of a court having jurisdiction over the subject matter is to be obeyed until it is to be overturned. The problem is that when a Court signs an order granting an application for appeal, that Court divests itself of jurisdiction of all matters in that appeal. I'm not sure that had Judge Fontenot become aware or been made aware at the time that the Clerk was sending up documents which she felt would not have been included in her order, whether she could have done anything about it. I think once the order was signed, jurisdiction was no longer with this Court.

I think further on, when the Court of appeal reversed and remanded and ordered costs to be paid by the appellant, then at that point, if the Court wanted to limit the court costs in accordance with the order or in any other way, it would have said so. Since it did

not, this Court must take the position that the record sent up to the Court of Appeal was needed by that Court of Appeal in order to make its ruling. And absent any instructions from the Court of Appeal as to the assessment of the costs, this Court must assess costs in accordance with those set forth by the Clerk of Court.

RULING ENDED.

# C E R T I F I C A T E

STATE OF LOUISIANA

PARISH OF LAFAYETTE

I, Vernelle P. Hebert, certified Shorthand Reporter, Official Court Reporter, 15th Judicial District Court, do hereby certify that the foregoing constitutes the Ruling of the Court as given in Open Court, Lafayette, Louisiana, April 17, 1989; that said Ruling was taken by me, and was thereafter reduced to typewriting.

Lafayette, Louisiana, April 19, 1989.

/s/ Vernelle P. Hebert

| | |
|---|---|
| J. MINOS SIMON d/b/a DIXIELAND FARM | 15TH JUDICIAL DISTRICT |
| VS. | DOCKET NUMBER: 85-6761 "G" |
| FASIG-TIPTON LOUISIANA, INC., ET AL | LAFAYETTE PARISH LOUISIANA |

* * * * * * * * * * * * * * * * * * * * * * *

**JUDGMENT**

THIS MATTER CAME BEFORE this court for hearing on April 17, 1989, on J. Minos Simon's, Defendant-in-Reconvention, Motion for New Trial, Alternatively for Rehearing, or Alternatively to Recall.

For the reasons orally assigned, IT IS ORDERED that J. Minos Simon's Motion for a New Trail, Alternatively for Rehearing, or Alternatively to Recall is denied.

FILED: APRIL 25, 1989

Rendered on April 17, 1989 and

signed on 24 day of April, 1989.

/s/ Durwood W. Conque
DURWOOD W. CONQUE
DISTRICT COURT JUDGE
15TH JUDICIAL
DISTRICT COURT
PARISH OF LAFAYETTE
LOUISIANA

NO. W89-466

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

FILED: MAY 1, 1989, 19

/s/Nancy M. Pledger

J. MINOS SIMON, ETC.

VERSUS

FASIG-TIPTON COMPANY, ETC.

In Re J. MINOS SIMON

Applying for Certiorari, or writ of review, to the 15th Judicial District Court, Parish of Lafayette State of Louisiana.

RAYMOND M. ALLEN, BOX 2304, LAFAYETTE, LA
Attorneys for Applicant

ANTHONY M. FAZZIO, BOX 2636 LAFAYETTE, LA
APPLICANT/PL

PERRET, DOISE (HENRY C. PERRET, JR.) BOX 52228, LAFAYETTE, LA.
Attorneys for Respondents/DEF

June 2, 1989
Lake Charles, LA

WRIT DENIED: FROM THE PLEADINGS AND DOCUMENTS FILED, WE CAN DISCERN NO CLEAR ERROR IN

THE COURT'S RULING. THE MOTION FOR A RULING OF CONTEMPT IS ALSO HEREBY DENIED. CONSIDERING THE ABOVE DECISION THE ORDER GRANTING THE STAY IS HEREBY LIFTED.

| /s/ JMS | /s/ NED, Jr | /s/ HLY |
|---|---|---|
| J.M.S. | N.E.D., Jr. | H.L.Y. |

THE SUPREME COURT OF THE STATE OF LOUISIANA

J. MINOS SIMON d/b/a
DIXIE LAND FARM

VS. NO. 91-C-0794

FASIG-TIPTON COMPANY OF
NEW YORK, ETAL

- - - - - - - - -

IN RE: Simon, J. Minos d/b/a; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; Parish of Lafayette Fifteenth Judicial District Court Div. "G" Number 85-6761; to the Court of Appeal, Third Circuit, Number CA89-0832

- - - - - - - - -

May 17, 1991

Denied.

PH

JLD

JCW

HTL

LFC

CALOGERO, C.J. and MARCUS J. would grant the writ.

Supreme Court of Louisiana
May 17, 1991

/s/ Frans J. Labranche, Jr.
Clerk of Court
For the Court

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| J. MINOS SIMON d/b/a DIXIELAND FARM | 15TH JUDICIAL DISTRICT |
| VS. | DOCKET NUMBER: 85-6761 |
| FASIG-TIPTON LOUISIANA, INC., ET AL | LAFAYETTE PARISH LOUISIANA |

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FILED:
MARCH 15, 1989

**JUDGMENT**

This matter came before this Court for hearing on January 30, 1989 on L.P. Thibodaux's, Plaintiff-in-Reconvention, Motion to Fix Costs of Appeal and on J. Minos Simon's, Defendant-in-Reconvention, Exception of Prematurity.

Considering the record of this case, the evidence, the testimony of witnesses, due proof having been submitted in favor of the ruling made herein, the law and evidence being in favor thereof, and for the reasons assigned in this Court's minute entry dated March 1, 1989,

IT IS ORDERED, ADJUDGED AND DECREED that L. P. Thibodaux's Motion to Fix

Costs of Appeal be granted, and that costs of appeal be set at FOUR THOUSAND ONE HUNDRED FORTY-FOUR AND 60/100 ($4,144.60) DOLLARS.

IT IS FURTHER ORDERED that J. Minos Simon's Exception of Prematurity be and is hereby denied at J. Minos Simon's costs.

SIGNED IN OPEN COURT in Abbeville, Louisiana, this 13 day of March, 1989.

/s/ Durwood W. Conque
DISTRICT JUDGE
15th Judicial District Court
Parish of Lafayette,
Louisiana

NO. 89-832
COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

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|---|---|
| J. MINOS SIMON d/b/a DIXIELAND FARM | PLAINTIFF-APPELLANT |
| VERSUS | |
| FASIG-TIPTON COMPANY OF NEW YORK, ET AL | DEFENDANT-PLAINTIFF-IN-RECONVENTION APPELLEE |
| L.P. "BUD" THIBODAUX | |

APPEAL FROM THE FIFTEENTH JUDICIAL DISTRICT COURT, PARISH OF LAFAYETTE, STATE OF LOUISIANA, HONORABLE DURWOOD CONQUE, JR., DISTRICT JUDGE PRESIDING.

BEFORE GUIDRY, STOKER and DOUCET, JUDGES

GUIDRY, JUDGE

Plaintiff sued, among others, L.P. "Bud" Thibodaux seeking recovery based on various actions arising out of a business arrangement. Motions for summary judgment were filed by both Simon and Thibodaux. Thibodaux's motion was granted on two extraneous issues which Simon did not appeal. Simon's motion was granted on the other issues. Thibodaux

appealed. This court reversed the trial court's judgment decreeing as follows:

> "For the foregoing reasons, we modify the trial court judgment as follows: We affirm the trial court's summary judgment in favor of defendant, L.P. Thibodaux, and against plaintiff, J. Minos Simon. We also affirm the decision of the trial court in denying defendant's motion to produce plaintiff's income tax returns. We reverse the remaining decrees in this judgment and the order of accounting directed to defendant by the trial court and remand this case to the trial court for further proceedings consistent with these findings.
>
> All costs of this appeal are taxed to the plaintiff-appellee." (Emphasis ours).

J. Minos Simon d/b/a Dixieland Farm v. Fasig-Tipton Co. of New York, 524 So2d 788 (La. App. 3rd Cir. 1988), writ denied, 525 So2d 1048, 1049 (La. 1988).

Following remand and the finality of this court's judgment, Thibodaux filed a motion in the trial court to fix costs of the appeal. Simon filed an exception of prematurity arguing that this court's judgment was not a final judgment but

interlocutory and therefore, the motion to fix costs was premature. After a hearing the trial court overruled the exception of prematurity and granted Thibodaux's motion fixing costs of the appeal at $4,144.60. Following rendition of the latter judgment, Thibodaux filed a motion seeking to have Simon examined as a judgment debtor. La. C.C.P. art. 2451 et seq. Thereafter, Simon applied to this court for supervisory relief in connection with the trial court's judgments assessing costs and ordering his examination as a judgment debtor. We denied supervisory relief stating in an unreported decision:

> "WRIT NOT CONSIDERED: Relator, J. Minos Simon, has not demonstrated any irreparable injury will result from the rulings of the trial court sought to be reviewed. Since relator has an adequate remedy by appeal, on the record filed in this court, we refuse to consider relator's writ application. Stevens v. Patterson Menhaden Corp., 191 So2d 692 (La.

App. 1st Cir. 1966), writ refused, 250 La. 5, 193 So.2d 524 (1967)."

Simon v. Fasig-Tipton Company of New York, et al, docket no. W89-396 (La. App. 3rd Cir. May 3, 1989).

Subsequent to our denial of supervisory relief, Simon motioned for a suspensive appeal from the trial court's judgments denying his exception of prematurity and fixing the costs of appeal at $4,144.60. Simon's appeal was granted by the trial court. Thibodaux thereafter filed a motion with this court seeking a dismissal of Simon's appeal which was denied in an unreported decision. Simon v. Fasig-Tipton Company of New York, et al, docket no. 89-832 (La. App. 3rd Cir. Dec. 14, 1989).

This appeal concerns only the trial court's judgment fixing the costs of appeal attendant to the earlier appeal in this case reported at 524 So2d 788 (La.

App. 3rd Cir. 1988). Simon contends that our judgment reported as aforstated, insofar as it taxes costs of that appeal to him, is an interlocutory judgment. From this premise, he argues that the trial court's judgments fixing appeal costs and ordering him examined as a judgment debtor are premature and invalid. Alternatively, Simon urges that the trial court's assessment of appeal costs is excessive.

THE JUDGMENT REPORTED AT 524 SO2D 788 (LA. APP. 3RD CIR. 1988)

La. C.C.P. art. 2164 grants authority to the appellate courts to tax costs of the lower or appellate courts, or any part thereof, against any party to the suit, as in its judgment is equitable. In our decree reported as aforstated all costs of that appeal were taxed to Simon, the appellant herein. Simon sought review of our judgment by application

for supervisory writs to the Supreme Court. His application for such review was denied. A judgment of the court of appeal is final and definitive, acquiring the authority of the thing adjudged, if no application for writ of certiorari to the Supreme Court is timely filed or if timely filed, when the Supreme Court denies the application for certiorari. La. C.C.P. art. 2166; Succession of Daste, 223 So2d 848 (La. 1969).

Appellant relies upon Freyou v. Marquette Casualty Co., 149 So2d 697 (La. App. 3rd Cir. 1963), writ refused, 150 So2d 771 (La. 1963), to support his argument that the judgment reported at 524 So2d 788 (La. App. 3rd Cir. 1988) was not a final definitive judgment insofar as it taxed costs of that appeal. In Freyou, the trial court granted summary judgment in favor of defendant dismissing plaintiff's suit and plaintiff appealed.

A panel of this court reversed the judgment of the trial court and remanded for further proceedings. Marquette Casualty applied to the Supreme Court for a writ of certiorari, which was denied at 150 So2d 771 (La. 1963), with the following per curiam, "WRIT REFUSED. The judgment is not final". Appellants suggests that this pronouncement makes clear that our judgment, after appeal in the instant case, is not a final judgment. Simon's reliance on Freyou is misplaced. The court's per curiam in Freyou referred to the merits of the controversy between Freyou and Marquette Casualty which clearly had not been determined. Their pronouncement did not concern the assessment of appeal costs attendant to the appeal reported at 149 So2d 677 which, like the instant case,

were assessed against the party cast in the appellate court's judgment.

Our judgment, insofar as it assessed the costs of the appeal in question, became a final and definitive judgment when the Supreme Court denied Simon's application for certiorari and from that time was subject to execution. Our judgment, insofar as it taxes costs of that appeal, is not interlocutory but a final judgment. Therefore, the trial court did not err when it overruled appellant's exception of prematurity and considered and rendered judgment on appellee's motion to assess costs of appeal.

TRIAL COURT'S ASSESSMENT OF COSTS

Appellant contends that the trial court's assessment of the appeal costs are excessive. Specifically, appellant urges that the Clerk of Court of the 15th Judicial District Court violated the

trial court's order granting the appeal in this case by preparing a record on appeal that consisted of the entire 12 volume record of this matter in lieu of the evidence, documents, and/or affidavits offered and relied upon by the parties in connection with their respective motions for summary judgment, as specifically ordered by the trial court.

The trial court's order of appeal in this case reads as follows:

"ORDER GRANTING APPEAL

The Motion for Suspensive Appeal of L.P. "Bud" Thibodaux is granted and, accordingly,

IT IS ORDERED that a Suspensive Appeal from the Judgment of this Court of September 9, 1986, made returnable to the Court of Appeals, Third Circuit on or before the 24th day of November, 1986 is hereby granted on the conditions that defendant, Thibodaux, shall post a bond as required by law in the amount of $50,000.00 and pay all costs of court.

IT IS FURTHER ORDERED that only that evidence, documents, and/or affidavits offered and relied upon by the parties in connection with their respective motions for Summary Judgment shall be included in the transcript to be prepared by the Clerk of Court. (Emphasis added).

Abbeville, Louisiana, this 25th day of September, 1986.

/s/ Sue Fontenot
Sue Fontenot, Judge
15th Judicial District Court"

The trial court rejected appellant's argument concluding that Judge Fontenot was without jurisdiction, following the order of appeal, to limit the contents of the record on appeal. We affirm but prefer to ground our decision on the fact that our law does not contemplate nor authorize the trial judge to control the content and preparation of the record on appeal.

The clerk of the trial court has the duty to prepare the record on appeal. La. C.C.P. art. 2127. When no designation of the record is made by the

parties pursuant to La. C.C.P. art. 2128, the record on appeal shall be a transcript of all proceedings as well as all documents filed in the trial court. La. C.C.P. art. 2128 provides as follows:

> "The form and content of the record on appeal shall be in accordance with the rules of the appellate court, except as provided in the constitution. However, within three days, exclusive of holidays, after taking the appeal the appellant may designate in a writing filed with the trial court such portions of the record which he desires to constitute the record on appeal. Within five days, exclusive of holidays, after service of a copy of this designation on the other party, that party may also designate in a writing filed with the trial court such other portions of the record as he considers necessary. In such cases the clerk shall prepare the record on appeal as so directed, but a party or the trial court may cause to be filed thereafter any omitted portion of the record as a supplemental record. When no designation is made, the record shall be a transcript of all the proceedings as well as all documents filed in the trial court."

Neither Simon nor Thibodaux designated the portions of the record which they desired to constitute the record on

appeal. In the absence of such designation, the clerk of the trial court was required to include all proceedings as well as all documents filed in the trial court. Article 2128 requires that any designation of the record made by the parties must be in writing. The obvious purpose of this requirement is for the clerk's guidance in the preparation of the record. The order of the trial court in this case, which limits the record to only that evidence, documents, etc. which the parties relied upon in connection with their respective motions for summary judgment, places the burden on the clerk of the trial court to designate the record on appeal, a result clearly at odds with the dictates of Article 2128 and Rule 2-1, et seq. of the Uniform Rules - Courts of Appeal.

As aforestated, appellant filed no written designation of the record

pursuant to Article 2128 and did not complain with regard to the content of the record in the trial court or in this court (La. C.C.P. art. 2132) until the filing of appellee's motion with the trial court to fix costs. Under such circumstances, appellant cannot now be heard to complain that the appellate costs are too high. Further, for the foregoing reasons, we find no merit in appellant's argument that the Clerk of the 15th Judicial District Court contemptuously violated the order of the trial court dated September 25, 1986.

For these reasons, the judgment of the trial court is affirmed. Appellant is cast with all costs of this appeal.

AFFIRMED.

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

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J. MINOS SIMON, ETC.

V. No. 89-832

FASIG-TIPTON CO., ET AL

BEFORE: JUDGES GUIDRY-STOKER-DOUCET

ORDER

The application for Rehearing herein having been duly considered:

IT IS ORDERED that a Rehearing be, and the same is hereby, REFUSED

Lake Charles, Louisiana, this 8th day of March, 1991.

/s/ ELG

/s/ JMS

/s/ NED
Judges

FILED MAR 8, 1991, 19

/s/ Nancy M. Pledger
Clerk

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| J. MINOS SIMON d/b/a DIXIELAND FARM | DOCKET NO. 85-6761 "G" |
| VS. | 15TH JUDICIAL DISTRICT COURT |
| FASIG-TIPTON COMPANY OF NEW YORK, ET AL | PARISH OF LAFAYETTE LOUISIANA |

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**ORDER GRANTING APPEAL**

The Motion for Suspensive Appeal of L. P. "Bud" Thibodaux is granted and, accordingly,

IT IS ORDERED that a Suspensive Appeal from the Judgment of this Court of September 9, 1986 made returnable to the Court of Appeals, Third Circuit on or before the 24th day of November, 1986 is hereby granted on the conditions that defendant, Thibodaux, shall post a bond as required by law in the amount of $50,000.00 and pay all costs of Court.

IT IS FURTHER ORDERED that only that evidence, documents, and/or affidavits offered and relied upon by the parties in

connection with their respective motions for Summary Judgment shall be included in the transcript to be prepared by the Clerk of Court.

Abbeville, Louisiana, this 25th day of September, 1986.

/s/ Sue Fontenot
SUE FONTENOT, JUDGE
15TH JUDICIAL
DISTRICT COURT

FILED: SEPTEMBER 26, 1986

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|---|---|
| J. MINOS SIMON<br>d/b/a DIXIELAND<br>FARM | 15TH JUDICIAL<br>DISTRICT |
| VS. | DOCKET NUMBER:<br>85-6761 "G" |
| FASIG-TIPTON<br>LOUISIANA, INC.,<br>ET AL | LAFAYETTE PARISH<br>LOUISIANA |

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**MINUTE ENTRY**

On plaintiff's Exception of Prematurity filed in response to defendant's Motion to Fix Costs of Appeal the Court finds, pursuant to La. Code of Civil Procedure Article 2166, that the judgment of the Third Circuit Court of Appeals assessing costs of the appeal against plaintiff, is a final and definitive judgment. Plaintiff's exception is overruled and defendant's Motion to Fix Costs of Appeal is granted. Costs of the appeal are set at $4144.60.

FILED: MARCH 3, 1989

Judgment in accord with this ruling will be signed upon presentation.

Abbeville, Louisiana this 1st day of March, 1989.

/s/ Durwood W. Conque
DISTRICT JUDGE

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|---|---|
| J. MINOS SIMON d/b/a DIXIELAND FARM | 15TH JUDICIAL DISTRICT |
| VS. | DOCKET NUMBER: 85-6761 "G" |
| FASIG-TIPTON LOUISIANA, INC., ET AL | LAFAYETTE PARISH LOUISIANA |

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MOTION TO EXAMINE JUDGMENT DEBTOR

The motion of L. P. Thibodaux ("Thibodaux"), Defendant in the above entitled and numbered action, respectfully represents:

1.

Mover is a judgment creditor of J. Minos Simon for all costs of appeal of the action entitled J. Minos Simon v. Fasig-Tipton of New York, et al, 524 So. 2d 788 (La. App. 3d Cir. 1988), all as more specifically set forth in the certified copy of the Appellate Court Judgment attached hereto as Exhibit "A". Said judgment has not been paid or satisfied.

2.

Mover desires to examine the said J. Minos Simon, Judgment Debtor, upon all matters pertaining to his estate or property pursuant to the Louisiana Code of Civil Procedure Article 2451, et seq.

3.

Mover also desires that the Judgment Debtor, J. Minos Simon, produce in court the following books, papers and documents which are in his possession and which are material in the cause, and desires as well to examine the Judgment Debtor in relation to and in connection with the said books, papers and documents pertaining to his estate and property:

(a) Current bank statements of checking and/or savings accounts;

(b) Current accounts receivable;

(c) All books, papers, documents and ledgers pertaining to the

business of Judgment Debtor;

(d) All certificates of title to any motor vehicles owned by the Judgment Debtor;

(e) Any stocks, bonds, notes, mortgages or other certificates of debt owed to the Judgment Debtor;

(f) Copies of titles to all immovable property owned by the Judgment Debtor;

(g) Federal income tax records of the last two years.

4.

By the above such books, papers and document, Mover intends to establish that the Judgment Debtor has property not exempt from seizure, in an amount sufficient to satisfy Mover's judgment.

WHEREFORE, Mover prays that it have the privilege of examining J. Minos Simon, Judgment Debtor herein, at a time

and place to be fixed by the judge of this Court.

Mover further prays that the Court command the said Judgment Debtor to produce into court at the same time, the books, papers and documents described in Paragraph 3 above.

Respectfully submitted:

PERRET, DOISE, DAIGLE, LONGMAN, RUSSO & ZAUNBRECHER

BY: /s/Ian A. Macdonald
HENRY C. PERRET, JR.
IAN A. MACDONALD
Post Office Drawer 3408
Lafayette, LA 70502-3408
(318) 261-1200
ATTORNEYS FOR L. P. THIBODAUX, DEFENDANT-IN-RECONVENTION

FILED: FEBRUARY 23, 1989

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|---|---|
| J. MINOS SIMON<br>d/b/a DIXIELAND<br>FARM | 15TH JUDICIAL<br>DISTRICT |
| VS. | DOCKET NUMBER:<br>85-6761 |
| FASIG-TIPTON<br>LOUISIANA, INC.,<br>ET AL | LAFAYETTE PARISH<br>LOUISIANA |

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ORDER

Considering the foregoing Motion to Examine Judgment Debtor,

IT IS ORDERED that J. Minos Simon, Defendant-in-Reconvention, appear in Open Court on the 3 day of April, 1989, at 10:00 o'clock a.m., to be examined as a Judgment Debtor under the provisions of Louisiana Code of Civil Procedure Article 2451, et seq.

IT IS FURTHER ORDERED that J. Minos Simon be further notified and summoned to produce in court the following books, papers and documents which are in his possession and which are material in the cause, and desires as well to examine the

Judgment Debtor in relation to and in connection with the said books, papers and documents pertaining to his estate and property;

(a) Current bank statements of checking and/or savings accounts;

(b) Current accounts receivable;

(c) All books, papers, documents and ledgers pertaining to the business of Judgment Debtor;

(d) All certificates of title to any motor vehicles owned by the Judgment Debtor;

(e) Any stocks, bonds, notes, mortgages or other certificates of debt owed to the Judgment Debtor;

(f) Copies of titles to all immovable property owned by the Judgment Debtor;

(g) Federal income tax records for the last two years.

Abbeville, Louisiana, this 2nd day of March, 1989.

/s/Durwood W. Conque
DISTRICT JUDGE

FILED: MARCH 2, 1989

NO. W89-396

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

Filed: Apr 18 1989, 19___

/s/ Nancy M. Pledger
Clerk

J. MINOS SIMON, ETC.

VERSUS

FASIG-TIPTON COMPANY, ETC.

In Re J. MINOS SIMON

Applying for Certiorari, or writ of review, to the 15th Judicial District Court, Parish of Lafayette State of Louisiana.

RAYMOND M. ALLEN, BOX 2304, LAFAYETTE, LA
Attorneys for Applicant

ANTHONY M. FAZZIO, BOX 2636 LAFAYETTE, LA
PL/APPLICANT

PERRET, DOISE (HENRY C. PERRET, JR.) BOX 52228, LAFAYETTE, LA.
Attorneys for Respondents/DEF.

May 3, 1989
Lake Charles, LA

WRIT NOT CONSIDERED: (See attached).

NUMBER W89-396

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

J. MINOS SIMON, ETC.

VERSUS

FASIG-TIPTON COMPANY, ETC., ET AL.

WRIT NOT CONSIDERED: Relator, J. Minos Simon, has not demonstrated any irreparable injury will result from the rulings of the trial court sought to be reviewed. Since relator has an adequate remedy by appeal, on the record filed in this court, we refuse to consider relator's writ application. Stevens v. Patterson Menhaden Corp, 191 So. 2d 692 (La. App. 1st Cir. 1966), writ refused 250 La. 5, 193 So. 2d 524 (1967).

/s/ JBF
J.B.F.

/s/ JTK
J.T.K.

/s/ CSK
C.S.K.

FIFTEENTH JUDICIAL DISTRICT COURT

PARISH OF LAFAYETTE

STATE OF LOUISIANA

J. MINOS SIMON d/b/a
DIXIELAND FARM

VERSUS DOCKET NO: 85-6761 "G"

FASIG-TIPTON, LOUISIANA,
INC., ET AL

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O R D E R

**CONSIDERING** the foregoing notice of intention to apply for supervisory writs and motion to stay:

**IT IS ORDERED** that petitioner shall file his application for supervisory writs with the Court of Appeal, Third Circuit, on or before the 19th day of April, 1989, and further, that the ex parte order of this Court dated March 2, 1989, is stayed, pending a final decision on petitioner's application for supervisory writs.

**GRANTED** in Abbeville, Louisiana,

this 17th day of March, 1989.

/s/ Durwood W. Conque
JUDGE, 15TH JUDICIAL
DISTRICT COURT

FILED: March 20, 1989